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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

December 3, 1999

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VIA COURIER

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in CC Docket No. 99-295

Dear Ms. Salas:

Yesterday Russell Frisby, Jonathan Lee and the undersigned attorney, on behalf of the Competitive Telecommunications Association ("CompTel"), met with Commissioner Powell and Kyle Dixon regarding the above-referenced proceeding. In that meeting, CompTel discussed the proposal in its comments in the above-referenced proceeding of October 19, 1999 that the Commission should adopt conditions establishing a comprehensive performance assurance mechanism in the event the Commission determines that Bell Atlantic's Section 271 application is otherwise suitable for grant. (As described in detail in its comments, CompTel submits that the application is *not* otherwise suitable for grant at this time.) CompTel emphasized that such conditions must embrace all three methods of enforcement under the Act – (1) private, self-enforcing remedies; (2) carrier-initiated complaints and arbitrations; and (3) agency-initiated enforcement, such as forfeitures, suspensions and revocation of authority. CompTel focused on the critical need for matching federal guarantees of performance in addition to the remedies available under the Performance Assurance Plan in New York. The parties also addressed the Commission's authority to adopt such conditions under the Communications Act. The attached summary of CompTel's comments in this proceeding was distributed.

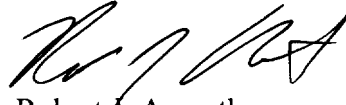
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Ms. Magalie R. Salas
December 3, 1999
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An original and one copy of this notice is provided.

Sincerely,



Robert J. Aamoth

cc: Office of Commissioner Powell

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Application by New York Telephone)	
Company (d/b/a Bell Atlantic – New York),)	
<i>Et al.</i> Pursuant to Section 271 of the)	CC Docket No. 99-295
Communications Act of 1934, as amended,)	
To Provide In-Region, InterLATA Services)	
In New York)	
)	

**COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

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DATED: October 19, 1999

SUMMARY

One of the principal purposes of Section 271 is to provide a mechanism to ensure that the market-opening initiatives of the 1996 Act are fulfilled. “Track A,” the competitive checklist, and the public interest test share as their underlying focus a desire to see proof that opportunities to provide local service are genuine, widespread and sufficient. As the primary industry association representing all types of competitive providers, it is CompTel’s fundamental policy mandate to see that the Act’s competitive opportunities are maximized for *all* its members, both today and in the future.

In New York, we are beginning to see the fruits that the 271 tree can bear. Twenty three of CompTel’s members are providing or preparing to provide local service within New York, at varying stages of entry. With some of Bell Atlantic’s commitments in New York, the results of third party testing performed by KPMG, and the New York Commission’s pro-competitive orders, we finally are beginning to see the cracks in Bell Atlantic’s obstacles to entry in the local market. This progress is proof that – if backed by the firm resolve of the FCC and by the leadership of state commissions like the New York Public Service Commission – the interLATA incentive can achieve its desired results. But recognition of just how far BOC compliance has progressed compared to previous applications does not lessen in any way the rigorous standards of Section 271.

Despite progress that clearly exceeds that exhibited by previous Section 271 applications, there are still unacceptable barriers to competitive local exchange entry in New York. Very real problems remain – problems that result from Bell Atlantic policies that restrict competition; from inadequate or unreliable ordering and provisioning capabilities; and from incomplete remedies for non-performance. These problems deny New York consumers the

benefits of full and fair competition for local exchange service. Unless and until these problems are addressed, Bell Atlantic's attempt does not achieve the goals established by Section 271. Although CompTel is encouraged by the progress to date, a faithful application of Section 271 requires the Commission to deny the Bell Atlantic application.

BELL ATLANTIC HAS NOT SATISFIED THE CHECKLIST

Bell Atlantic's showing of checklist compliance continues to suffer from three main defects:

Unlawful Restrictions: Even after the Supreme Court, last January, reinstated Bell Atlantic's obligation to offer end-to-end combinations of unbundled network elements (the so-called UNE "platform") and other partial combinations such as the Enhanced Extended Link ("EEL"), Bell Atlantic continues to place unlawful restrictions on access to these elements critical to widespread market entry. CompTel demonstrates that the "primarily local" restriction on use of extended links, "glue charges," and the denial of the platform for all business customers in many end offices contradict the Act and the Commission's rules. Accordingly, until Bell Atlantic offers unrestricted access to these elements, it is not in compliance with the checklist.

Failure to Address the UNE Remand: Related to Bell Atlantic's refusal to modify its proposals after the Supreme Court's decision, Bell Atlantic makes only a passing reference to the FCC's reaffirmation of the unbundling requirement in the UNE Remand proceeding. Because the UNE Remand order interprets the same statutory requirements on which the FCC must make affirmative findings in this proceeding, the Commission cannot let Bell Atlantic ignore whether, how, or when it would comply with this order. Therefore, if the FCC does not deny the application for its complete failure to address this foreseeable issue, it must require Bell

Atlantic to submit in the record of this proceeding a compliance plan, and must afford all interested parties an opportunity to comment.

While CompTel's concerns about Bell Atlantic's existing restrictions on UNEs and future compliance with the Commission's UNE Remand may seem like mere legal technicalities, the practical effect of failing to consider these problems may be that New York consumers, by virtue of Bell Atlantic's self-serving claims of ignorance of the law, will not get the benefit of a rigorous 251(c)(3) compliance analysis that the Commission will almost certainly apply to every subsequent Bell Atlantic 271 application.

Continued Deficient Provisioning of UNEs: Bell Atlantic continues to be unable to provision network elements reliably or in a commercially acceptable manner. For the most customer-affecting type of UNE orders -- a "hot cut" of a functioning loop from the ILEC to a CLEC -- Bell Atlantic continues to put an unacceptable number of customers out of service for extended periods and fails to follow the coordination procedures it has agreed to follow in order to minimize such errors. In addition, Bell Atlantic fails to provide transport in a reasonable, timely and non-discriminatory manner. Finally, Bell Atlantic is imposing unlawful and discriminatory restrictions on loops used for xDSL services, thereby impeding the deployment of this widely popular technology.

BLUEPRINT FOR ANTI-BACKSLIDING ENFORCEMENT

Bell Atlantic's present failure to provision UNEs in a non-discriminatory manner and to otherwise comply with the checklist is exacerbated by the fact that a comprehensive performance assurance mechanism does not exist. To date, Bell Atlantic's performance assurances have been limited to the development of "self-enforcing" remedies under the auspices

of the New York Commission. However, these assurances fail to ensure adequate legal and equitable remedies for the entire spectrum of potential post-271 performance deficiencies.

The Commission cannot conclude that the application will serve the public interest unless it adopts a comprehensive anti-backsliding blueprint. These conditions must work with all three methods of enforcement under the Act: (1) private, self-enforcing remedies, (2) carrier instituted complaints and arbitrations, and (3) agency-initiated enforcement, such as forfeitures, suspensions and revocation of authority.

The Commission has a strong legal basis to condition Bell Atlantic entry on compliance with such a blueprint. As CompTel explains, such conditions are contemplated by Section 271, have traditionally been imposed under the Commission's authority pursuant to Section 310(d) over radio licenses, and find additional support pursuant to Sections 201(b), 214, 303(c) and 154(i) of the Communications Act. Moreover, the scope of the Commission's authority is as broad as its traditional public interest analysis, and CompTel's proposal does not implicate Section 271(d)(4)'s prohibition on limiting or extending the terms of the checklist. Because the conditions will take the economic incentive out of substandard performance and will assist the processes of addressing persistent or egregious problems, they will further the public interest in this case. Only with these conditions can the Commission receive adequate assurance that local markets will be open to all methods of entry and will remain so after Section 271 is satisfied.

Specifically, CompTel proposes the following additional remedies be made available as a blueprint for effective enforcement.

Self-Executing Remedies

- Apply matching *federal* guarantees of performance in addition to those remedies available under the P.A.P.

- Apply *additional remedies* if Bell Atlantic’s performance in a Critical Measure is significantly worse than the benchmark, such as refunds equal to all charges the CLEC billed to the affected end users.
- Apply additional remedies for deficient performance that is *industry-wide*.

Carrier-Initiated Remedies

- Deem repeated failures to meet Critical Measure performance metrics in the P.A.P. – *e.g.*, failure to meet any performance metric twice in a three consecutive reporting periods, or three times in any six consecutive reporting periods – to be prima facie evidence in complaint proceedings of a violation of BA-NY’s interconnection agreements.
- Deem Critical Measure performance that is significantly worse than the benchmarks to be prima facie evidence of a failure to provide interconnection or access under Section 251.
- Address non-quantitative failures by presumptions of non-compliance. For example, prima facie evidence of discrimination could be provided by evidence that Bell Atlantic does not devote equivalent resources to wholesale and retail businesses or that it applies discriminatory performance bonuses and incentives for executives in the wholesale and retail businesses.
- Deem certain failures to comply with basic obligations under Section 251 to be prima facie evidence of liability to CLECs. For example, failure to respond to an interconnection request within 14 days or failure to provide opt-in under Section 252(i) within 14 days shall be deemed to be bad faith by Bell Atlantic. Similarly, failure to provide collocation within the time frames specified in the *Collocation Order* will be deemed a breach of its obligation under Section 251(c)(2) to provide interconnection.
- “Ordinary” poor service, as described above, when coupled with “intent” evidence that Bell Atlantic is seeking to profit its retail arm by exploiting competitor’s poor service, for which it may be at least partially responsible. *E.g.*, Bell Atlantic provides poor repair and maintenance intervals to a CLEC, and sends CLEC retail customers a “winback” letter asking them whose service they would trust during the next big storm.

Agency-Initiated Remedies

- Repeated failures to meet any Mode of Entry performance metric *on an industry-wide basis* should trigger a performance improvement evaluation under the supervision of the FCC’s Common Carrier Bureau. For example, upon a repeated failure to meet a metric, Bell Atlantic should be required to submit a performance improvement plan to the Common

Carrier Bureau, and the Bureau should submit public comment on the improvement plan.

- Significant non-compliance with performance metrics should trigger forfeiture proceedings with substantial (\$1 million or more) penalties. Each day under the reporting period should be deemed a separate event subject to the forfeiture authority of the agency.
- Whenever wholesale provisioning problems are either so egregious or pervasive as to be, in the Commission's opinion – industry affecting, such that the public policy goals of Congress may be jeopardized, the FCC should take whatever action it needs to implement the goals of Congress, including, possibly, consideration of a structural separation between Bell Atlantic's wholesale and retail businesses.